SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 700

CLIFFORD A. WILLIAMS,
Petitioner

vs.

RAYMOND W. ANDERSON,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above matter on July 21, 1966.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Delaware (A. p. 19, infra) on the direct appeal of petitioner's conviction is reported at 205 A. 2d 9 (1963). The memorandum opinion of the United States District Court for the District of Delaware (A. 5) and that court's supplemental opinion (A. 10), dismissing petitioner's Petition for a Writ of Habeas Corpus, is reported at F. Supp. (D. Del. 1964). The opinion of the United States Court of Appeals for the Third Circuit (A. 14) is reported at 362 F. 2d 1011 (3rd Cir. 1966).

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on July 21, 1966 (A. 12). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

I. Was petitioner denied due process by reason of the trial court's failure to afford him a reliable determination of the issue of voluntariness of his admissions before submitting the evidence of those admissions and the issue of voluntariness to the jury?

II. Was petitioner denied due process by reason of the introduction into evidence of certain admissions of a codefendant, which admissions substantially affected the petitioner's case, where those same admissions were ruled by the trial court, at a second trial, to be inadmissible in evidence because they were involuntary and coerced, and by reason of conflict between testimony of state's witnesses in the two trials?

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "Section 1 . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

Petitioner, together with two co-defendants, Edward Brennan and Allison Williams, the petitioner's brother, came to trial in the Superior Court of Delaware, New Castle County, before a jury, on March 28, 1961, the Court having refused to sever the cases of the several defendants for purpose of trial (hereinafter referred to as the first trial). The indictment charged burglary of a jewelry store, known as "House of Diamonds" located in Wilmington, Delaware, "between the fifth day of December and the sixth day of December, 1959."

The State made its case at appellant's trial by introducing evidence of a breaking and entering and a removal of certain personal property occurring at the premises identified in the indictment, and that both appellant and his co-defendant had allegedly made certain oral statements and exhibited conduct in the nature of admissions, connecting or tending to connect them with the crime charged.

Police Lieutenant Celano and Police Sergeant Merritt, testified on behalf of the State concerning the subject statements and conduct. They first denied that they had made any promises to petitioner or co-defendant, Allison Williams, and testified that the alleged statements and conduct were voluntary. Subsequently, the officers did testify to certain promises made by them to petitioner and co-defendant, Allison Williams; and that, Mr. Davis, the owner of the "House of Diamonds" promised both

defendants that "he would drop the charges if he was made whole again." A close examination of the notes of testimony of the trial, reveals that the trial court was aware, or should have been aware, that a serious question existed as to whether or not promises had in fact been made by the police to the petitioner and co-defendant, Allison Williams, resulting in the obtaining of involuntary, incriminating admissions, in violation of their constitutional rights (A. 16-A. 39).

Notwithstanding the readily apparent question of the voluntariness of the admissions, the trial court proceeded to present this question to the jury. The trial court did not hold a prior hearing out of the presence of that jury, that procedure approved by your Honorable Court in the case of *Jackson v. Denno,* 378 U.S. 368.

Petitioner, who exercised his constitutional right to remain silent and did not testify, was found guilty. However, the jury disagreed as to the guilt or innocence of the co-defendant, Allison Williams. The co-defendant, Allison Williams, received a new trial, before a jury, on June 12, 1961 (hereinafter referred to as the second trial).

The evidence admitted against petitioner at the first trial included the alleged admissions and incriminating conduct made and exhibited by petitioner and the co-defendant, Allison Williams, to the police. It appeared, however, at the second trial, that the admissions and incriminating conduct which had been admitted into evidence against petitioner in the first trial had, in fact, been involuntary and coerced. Some of the promises were: (1) that petitioner would be removed from Florida and returned to Delaware without a detainer (A. 19); (2) that the police would cooperate and have bail arranged (A.

26), and in fact such bail was arranged (A. 29); (3) that the police would do nothing that would allow the Federal Bureau of Investigation to come into the case (A. 35); (4) that the police allowed Mr. Davis, the owner of the "House of Diamonds", to state to the petitioner several times that he would drop the charges against petitioner if he recovered his jewelry (A. 36); (5) that if they cooperated with the police they would not be tried on a charge of larceny (A. 43).

In the second trial, with substantially the same testimony before it as had been before the Court in the first trial, the Court recognized a question of the voluntariness of the admissions and conduct. Thereafter, the Court ruled that all statements or conduct exhibited by the co-defendant, Allison Williams, after December 31, 1959, were inadmissible as evidence since all such admissions or conduct were involuntary and coerced. Again, many of these same admissions and conduct were before the jury in the first case and were considered by the jury in finding petitioner guilty.

There also appeared substantial inconsistencies in the police officers' testimony at the two trials.

At the first trial, the police denied that any promises had been made to appellant or the co-defendant. At the second trial, however, under pressing cross-examination by the Court itself, the police admitted that, in fact, certain significant promises were made to both petitioner and the co-defendant, Allison Williams.

It appeared as new matter or after-discovered evidence at the second trial, that when the police apprehended petitioner in Florida, he was promised that if he co-

operated with them, they would take him out of Florida without a detainer, and this promise was in fact carried out, and appellant was taken by automobile from Florida to Delaware without any detainer being lodged against him (A. 41). A comparison of the records of the first and second trials discloses discrepancies as to whether the co-defendant, Allison Williams, made any admissions on or before December 31, 1959, the date on which the trial court found the police promised him that they would reduce his bail in consideration of his promise to cooperate.

At the first trial, Lieutenant Celano testified (A. 16), that Allison Williams had refused to state on December 31 what role, if any, he played in the crime. At the second trial, however, Celano changed his testimony and testified that Allison Williams admitted on December 31 that he was a lookout (A. 40). At the first trial, Sergeant Merritt (A. 37) testified that Allison Williams made the lookout admission to Celano. At the second trial, Merritt changed his testimony and stated that Allison Williams had admitted to him, Merritt, on December 31, that he was a lookout (A. 51). At the second trial, Merritt testified (A. 41) that Allison Williams had refused to say anything at all on the ride from Camden to Wilmington on December 31. Celano testified, however (A. 40), that it was during this very same ride that Allison Williams admitted that he was a lookout.

It appears elsewhere in the record of the second trial (A. 42) that on or before December 30, 1959, a promise was made by the police to Allison Williams that the F. B. I. would not be brought into the case if he would cooperate with the Wilmington police in the solution of the crime. Later, on January 16, 1960, Sergeant Merritt promised

Allison Williams that both the defendants would not be prosecuted for larceny if they continued to cooperate with the police in disclosing the facts of the case (A. 47).

At the first trial, the police denied that any promise was made to petitioner in consideration of his admissions and cooperation (A. 19). The record of the second trial clearly discloses that petitioner would be removed from Florida without a detainer if he cooperated (A. 41). Later, in Wilmington, on January 16, 1960, petitioner was promised by the police that he would not be prosecuted for larceny if he cooperated (A. 43).

On December 30, 1959, the police agreed with the co-defendant, Allison Williams, not to call the F.B.I. in on the case if he cooperated (A. 40). Sergeant Merritt testified (A. 42):

> "He made us promise the very first day that we had him back that if he cooperated in any way, shape, or form with the local authorities here that we are not to notify the F.B.I. in anything that they may have jurisdiction in. We made the promise to him that if there was any way possible we would not notify the F.B.I. in anything that we would have jurisdiction in prior to notifying them."

On the night of December 31, 1959, in pursuance of their promises, the police caused Allison Williams' bail to be reduced from $15,000.00 to $5,000.00 (A. 50).

REASONS FOR GRANTING THE WRIT

1. The instant case is governed by the effect of the decision of the Supreme Court of the United States in *Jackson v. Denno*, 378 U.S. 368 (1964).

In the *Jackson* case the Court stated as follows:

> "It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, Rogers v. Richmond, 365 U.S. 534, and even though there is ample evidence aside from the confession to support the conviction. Malinski v. New York, 324 U.S. 401; Stroble v. California, 343 U.S. 181; Payne v. Arkansas, 356 U.S. 560. Equally clear is the defendant's constitutional right at some stage in the proceedings to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession. Rogers v. Richmond, supra. In our view, the New York procedure employed in this case did not afford a reliable determination of the voluntariness of the confession offered in evidence at the trial, did not adequately protect Jackson's right to be free of a conviction based upon a coerced confession and therefore cannot withstand constitutional attack under the Due Process Clause of the Fourteenth Amendment."

It is not disputed that the procedure which was followed by the trial Court and in which the jury determined the voluntariness of alleged admissions of the petitioner and the co-defendant, Allison Williams, instead of the trial Judge, was the same as the New York procedure which was declared unconstitutional in the Jackson case.

2. The United States Circuit Court in its opinion stated that the Jackson case does not govern the instant case because the issue of voluntariness of the admissions was not raised at the trial.

In the *Jackson* case, the appellant's attorney did not object to introduction of the defendant's admissions, but the United States Supreme Court did not state that the appellant's failure to object effected a waiver of his right to raise the issue of voluntariness on appeal. On the contrary, the Court entertained the issue because the trial court indicated an awareness that the defendant's counsel was questioning the circumstances under which the alleged admissions were obtained.

In the instant case, the trial judge indicated that he was aware that voluntariness was an issue by the very form and language of his instruction in submitting the issue to the jury (A. 39).

The issue of voluntariness was raised by the testimony itself, which was to the effect that the appellant, without benefit of counsel, was importuned by the police, who removed him from Florida to Delaware without detainer, warrant or extradition; treated him as a boon companion; furnished him bail and released him. This apparently extraordinary treatment, during which the admissions were allegedly made was rendered after the accusatory stage had commenced.

Reasons for Granting the Writ

The United States Supreme Court has consistently held that Federal Court jurisdiction of an issue of constitutionality is not defeated by procedure in the state courts unless the failure to raise a federal constitutional claim in the state courts could be described as a deliberate by-passing of state procedures. *Fay v. Noia*, 372 U.S. 391; *Johnson v. Zerbst*, 304 U.S. 458 and *Jackson v. Denno*, supra. In the instant case failure of raising specific objection to the illegal procedure used to determine voluntariness obviously was not a deliberate or even inadvertent by-passing of state procedures, but a justifiable failure to recognize the constitutional right and its violation because this right had not been clearly defined until the United States Supreme Court's decision in the *Jackson* case, decided some three years after the trial in the instant case.

3. At the conclusion of the first trial the Court charged in part (A. 38):

> "Evidence has been introduced during this trial tending to show that on an occasion other than this, the defendant, Allison Williams, and also the defendant, Clifford Williams, made oral statements tending to prove their guilt of the alleged crime for which they are on trial. These statements, as I construe them, are in the form of what we would call as admissions. I will say to you that an admission can effect only the defendant who made it and *it is not evidence against other defendants who were not present when the admission was made.*" (Italics added.)

The effect of this portion of the charge was to instruct the jury that an admission by one defendant is evi-

dence against other defendants if those other defendants were present at the time the admissions were made.

The testimony of Lieutenant Celano at the first trial is that he and Sergeant Merritt brought petitioner and the co-defendant, Allison Williams, "back to Wilmington because Allison Williams had stated to us that, without Clifford, it would have been futile in an attempt to recover the other half of the jewelry." Lieutenant Celano went on to testify concerning the conversation between himself, Sergeant Merritt, petitioner and the co-defendant, Allison Williams, while en route from Florida to Wilmington on or about January 14, 1960 (A. 20). This conversation, as related by Lieutenant Celano, in the presence of the jury, was highly prejudicial to petitioner's case. Compounding this prejudicial testimony was the charge of the Court to the effect that any admissions by Allison Williams, in the presence of petitioner, was evidence against petitioner and should be considered as such by the jury.

In the second trial of co-defendant, Allison Williams, the Court, recognizing the issue of the voluntariness of those admissions and that conduct of Allison Williams, as related in the testimony of Sergeant Merritt, began to question the officer (A. 42). Thereafter, the Court struck the testimony from the record as it related to any admissions or conduct on the part of Allison Williams after December 31, 1959, due to the promises made by the police officers to Allison Williams. A substantial part of the same testimony of those admissions and of that conduct stricken from the record in the second trial had been admitted and was considered by the jury in its finding against petitioner in the first trial. It follows, ad seriatim, that at least a part of the evidence submitted to the jury

in the trial against petitioner was tainted in that it was obtained illegally, that such admissions were involuntary and coerced, and were obtained by the police in violation of the constitutional rights of petitioner and co-defendant, Allison Williams.

On this point, petitioner's case falls squarely within the purview of the case of *Jackson v. Denno,* supra. In the opinion filed in that case, your Honorable Court said at page :

> *"It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession,* without regard for the truth or falsity of the confession, Rogers v. Richmond, 365 U.S. 534, and *even though there is ample evidence aside from the confession to support the conviction."*

It is patently clear on the record that petitioner's conviction was based in whole or in part upon evidence of admissions and incriminating conduct, obtained through promises made by the state to petitioner and co-defendant, Allison Williams, and were involuntary and coerced, and were obtained in violation of the constitutional rights of petitioner and co-defendant, Allison Williams.

4. Finally, appellant's trial was not conducted with that "fundamental fairness" which due process of law requires.

A comparison of the transcripts of the records of the first and second trials discloses that substantial discrepancies and such conflicting versions as to the alleged admissions made by Allison Williams, as to render the testi-

mony of the police officers concerning all admissions alleged to have been made by both defendants totally unreliable. The unreliability of the police testimony is accented by the following exchanges of the witness, Sergeant Merritt, and the Court at the second trial. In response to one question by Chief Justice Terry Merritt denied that any promises were made to Allison Williams before January 16, 1960, admitting, however, that on that date the police did promise both defendants that they would not be prosecuted for larceny, in addition to burglary, if they cooperated with the investigating officers (A. 47). Later, at the second trial, however, Merritt admitted when pressed by the Court that, on December 31, 1959, Allison Williams was promised that his bail would be reduced if he cooperated (A. 49), and further admitted that, on the preceding day, December 30, 1959, he promised the defendants that the F.B.I. would not be called into the case if they cooperated (A. 42). It may be significant that Merritt's direct examination at the second trial made no reference whatsoever to any admissions on either December 30 or December 31, 1959.

Under axiomatic principles of law, the promise made to appellant by the police to remove him from Florida without a detainer, and the later promises not to call in the F.B.I. rendered his subsequent alleged admissions and incriminating conduct involuntary. The same principles foreclose evidence of admissions and incriminating conduct by Allison Williams on and after December 30, 1959. In this connection, it is significant to note that the police testified at the second trial that Allison Williams feared the F.B.I. and literally begged them not to notify that federal agency (A. 42).

Reasons for Granting the Writ

The constitutional guarantee of due process includes the right to a trial without intentional or inadvertent enlargement or concealment of facts. It is quite clear that all of the several versions given by the police cannot be correct and true. The police versions vary so widely that grave doubt is cast upon the accuracy of their recollections. The cumulative effect of all the discrepancies and contradictions is the denial of due process. In the words of Chief Judge Wright in *Curran v. State of Delaware* (U.S. D.C. Del.), 154 F. Supp. 27:

> "The issue is not one of guilt or innocence of these defendants. The problem is whether that degree of 'fundamental fairness, essential to the very concept of justice', as required by the due process clause of the Fourteenth Amendment, was achieved in the rape trial of these defendants. The heinous and brutal nature of the crime, and the probabilities or possibilities of the establishment of guilt in accordance with the procedure deemed by the Federal Constitution are not before this Court."

In the *Curran* case, as here, there was some evidence of guilt dehors the defendant's statement. Judge Wright said:

> "Even though the evidence used for this purpose be cumulative, a conviction obtained by use of the statements must be set aside if, when considered together with the other factors, the trial is rendered fundamentally unfair to the accused. This reason must follow even though evidence apart from the statements might have been sufficient to sustain the verdict."

The analogy to the present case is clear. Even if it should be held that one or more of the incriminating state-

ments admitted in evidence against petitioner were legally admissible, the cumulative effect of the inadmissible testimony cannot be discounted. In so far as the bulk of the evidence was inadmissible, the trial was devoid of fundamental fairness.

In the present case, the police testified at both trials that their testimony was based upon contemporaneous notes. If this is so, it is indeed extraordinary, not only that the officers' testimony differs from each other, but that each officer contradicts himself at the second trial.

The *Curran* case holds that the use of perjured testimony is a denial of due process. Substantially inaccurate or erroneous testimony can be as damaging as the perjured variety. Whether the distortion of a fact is intentional or negligent or simply the result of a fault of memory, is unimportant. Judge Wright stated in the *Curran* case:

> "The line between tolerable imperfection and fundamental unfairness in a criminal trial is not clearly discernible."

It is submitted that, in the present case, "tolerable imperfection" was grossly exceeded, and appellant's trial was tainted with "fundamental unfairness", such that he was denied due process.

5. An issue of substance raised on appeal was the application of the rule of *Escobedo v. State of Illinois*, 378 U.S. 478 (1964). The instant case was tried before the Escobedo trial, but Escobedo won a "race to the decision" and was adjudicated prior to this appeal. It is apparent that the instant case would have been governed by the Escobedo rule, if *Johnson v. New Jersey*, 384 U.S. 719 (1965), had not held that the Escobedo rule affects only

those cases in which trial began before the date of that decision.

The United States Supreme Court, in the Johnson case stated, at page 730:

> "At the same time, our case law on coerced confessions is available for persons whose trials have already been completed, providing of course that the procedural prerequisites for direct or collateral attack are met."
>
> • • • • • • • • • •
>
> "Prisoners are also entitled to present evidence anew on this aspect of the voluntariness of their confessions if a full and fair hearing has not already been afforded them."

In the instant case, it is evident that the Petitioner was not properly protected under existing case law on coerced confessions, unless the decision of the United States Circuit Court of Appeals is reversed.

CONCLUSION

It is respectfully submitted that this Court should grant a writ of certiorari to further clarify the procedure to be followed in determination of voluntariness of incriminating statements of a defendant and co-defendant, especially when a subsequent trial of a co-defendant unquestionably proves some of the statements inadmissible because they are coerced.

Respectfully submitted,

D. T. SPAGNOLETTI,

Attorney for Petitioner.

APPENDIX

I.

SUPREME COURT OF DELAWARE OPINION BELOW, AFFIRMING CONVICTION (APRIL 15, 1964)

Carey, J.:

Appellant has appealed from an order of the Superior Court denying his application for a new trial under Criminal Rule 35(a). His application was based primarily upon testimony of certain police officers given at the second trial of a co-defendant, Allison Williams. This evidence pertained to certain promises allegedly made by the officers to the defendants which, it is contended, rendered their admissions involuntary.

The matter was previously before this Court on appeal from the conviction. The judgment was then affirmed without prejudice to appellant's right to seek relief under Rule 35(a). It was pointed out that the alleged error was based upon a post-conviction event which could be considered only in a proceeding under the rule. Most of the facts were stated in the former opinion and will not be repeated.

The appellant contends that he was deprived of due process by reason of inadmissible evidence and by reason of conflicting and unreliable police testimony. He argues that the officers at the first trial denied that any promises had been made, but testified to the contrary at the second trial.

In his brief, appellant makes the suggestion that statements of his co-defendant, induced by the promises, were

admitted against him. The record does not support this contention. The trial Judge made it plain to the jury during the trial and in his charge that an admission can affect only the defendant who made it and could not be used against another defendant who was not present when the admission was made. The charge given on this subject appears to be precisely the language of defendant's own prayer. We accordingly give no consideration to the admissibility of the co-defendant's statements and conduct.

It was pointed out in *State v. Donovan*, 1 Terry 257, 8 A. 2d 876, that a promise must, among other things, be a controlling inducement to a confession in order to render it involuntary. Obviously, to be a controlling inducement, any promise made by an officer must have been known to the defendant prior to the making of the admission; yet, at his trial, no objection was made to the receipt of this evidence upon that ground; in fact, there was not even a request for a preliminary examination or "voir dire" according to the customary practice mentioned in *State v. Donovan*, supra. We consider that the proper time for the defendant to have brought out any lack of voluntariness on his part was at that trial; he is presently in no position to complain of the admission of his own statements and conduct.

It is charged that the police testimony varied greatly at co-defendant's trial from that given during the first trial. We are of the opinion that the variations, if any, are no greater or more significant than experience shows is to be expected from almost any witness. True, the officers said certain things at the second trial which they did not say at the first one, presumably because nobody asked them. This can hardly be called perjury nor can it prop-

erly be called a deliberate concealment of evidence when, in fact, defendant made no effort to bring out any testimony concerning these alleged promises, although he must have known as much as anyone else about them.

One promise is alleged to have been made in Florida to this defendant. The testimony at both trials was that he told the Delaware officers that he would cooperate if they saw to it that he was brought back to this State without a Federal detainer. The uncontradicted testimony at both trials shows that no promise on this score was made to him.

The second item is a promise made to the co-defendant that the Federal Bureau of Investigation would not be called in. This promise was specifically mentioned at the first trial by one officer; it was also mentioned by the co-defendant. The other officer was apparently asked nothing about it.

The third problem has to do with reduction of bail for the co-defendant, which took place several days before this defendant was ever seen by the officers. At the first trial, this was mentioned by Allison Williams as a promise. The officers then said nothing about having made such a promise but they did testify that Allison's bail was reduced at *their* request after he had helped to recover some of the jewelry.

The final promise was to the effect that neither defendant would be indicted for larceny if they brought back the jewelry and pleaded guilty to burglary. This promise was mentioned by the co-defendant at the first trial, and was not specifically denied by any state witness. The officers were asked no questions about it. At the second trial, it

became clear that those officers had made no such promise but that it was in fact made by the Attorney General.

We are fully satisfied that the situation before us furnishes no proper basis for applying the theory mentioned by Judge Wright in *Curran v. State*, 154 F. Supp. 27. We find no justification for holding that defendant's conviction was the result of perjured testimony or deliberate concealment of pertinent evidence.

The judgment of the Court below will be affirmed.

II.

MEMORANDUM OPINION

Layton, District Judge.

Three defendants, Edward Brennan, Allison Williams and his brother, Clifford Williams, were charged with fourth degree burglary under the following indictment:

> "Between the fifth day of December, 1959, and the sixth day of December, 1959, in the County of New Castle, did then and there feloniously break and enter the premises of Louis Davis, T/A House of Diamonds, 303 Delaware Avenue, Wilmington, Delaware, with intent to commit larceny of jewelry valued at approximately thirty-five thousand dollars."

Motions for a severance were denied. Defendants were tried. Near the end of the trial, Brennan was granted a severance. Clifford, who did not take the stand to testify in his own defense, was convicted and the jury disagreed as to Allison. Thereafter, Allison was tried alone and convicted. Clifford's appeal and a subsequent appeal under the Delaware Criminal Rule 35 were denied.

During the first trial, it was revealed that Allison was brought to Delaware from his home in New Jersey on December 30, 1959. Starting on that date, Allison made a number of admissions which were admitted into the trial.

Clifford was brought back to Delaware from Florida on January 9, 1960. While in Florida, en route from Florida to Delaware and while in Delaware prior to trial,

he also made admissions which were admitted into evidence.

After exhausting his remedies in the State court, as just mentioned, Clifford filed this petition for habeas corpus.

There are two grounds upon which the petition is based: (1) That admissions made by himself and Allison based upon promises of reward, and therefore inadmissible as evidence, were admitted against him, (2) that his conviction in part, at least, was based upon the testimony of police officers which was so contradictory as to be unworthy of belief and, thus, under the doctrine of Curran v. State, 154 F. Supp. 27, must be set aside.

First, as to the admissions of Allison introduced at the first trial, the Court charged the jury in the very language of the prayer submitted by Clifford's own counsel that admissions of a codefendant not made in the presence of the other defendant were inadmissible as to the latter and should not be considered against him.[1] There is no substance to this argument.

Secondly, it is the rule that a promise must be a controlling inducement to a confession in order to make it involuntary and to be a controlling inducement, it must have been known to the defendant prior to the making of the admission. State v. Donovan, 8 A. 2d 876 (Del. Super.). Despite this obvious fact, at the trial defendant made no objection whatever to the introduction of the admissions complained of. And further, in answer to

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[1] An admission can affect "only the defendant who made it and it is not evidence against other defendants who were not present when the admission was made."

defendant's superficially plausible argument that, having elected not to take the stand in his own defense, he was unable to contest the truth of the admissions introduced against him, it is pointed out that, in accordance with the long-settled practice of the state courts of Delaware, defendant had an opportunity, *without the presence of the jury,* upon voir dire to attack the admissibility of such admissions but did not do so. These arguments also are without merit and must be dismissed.

Finally, there remains the contention that certain of the testimony of the police officers was so contradictory as to amount to perjury and, thus, the conviction must be set aside. Curran v. State, supra.

Despite petitioner's strenuous complaint about the police testimony, only one specific instance is cited and that is the allegation that some of Sergeant Merritt's testimony in the second trial dealing with the time certain alleged promises of immunity were made is inconsistent with other portions of his testimony. This allegation will not stand close examination.

Petitioner points to testimony by Merritt to the effect that no promises of immunity were made by the police to Allison Williams until January 16th at a meeting in the Attorney General's office where Mr. Bove stated that if the balance of the jewelry were returned, charges of larceny against Allison would be dropped. Then he cites other testimony by Merritt admitting that promises to reduce bail were made earlier than January 16th. Carefully read, it is very plain to me that Merritt did not regard a promise to reduce bail as being an offer of immunity and in my judgment, his interpretation of the two promises were perfectly proper. Thus, when he stated

that the first offer of immunity was made on January 16th, he was not contradicting his earlier testimony that prior to that time, an offer to reduce bail was made which would enable Williams to go with the police to New Jersey to try and locate the jewelry. So viewed there is no merit to this contention.

Since this is the only specific challenge to the reliability of the police testimony before me, I feel it necessary to do no more than observe that before the Supreme Court of Delaware, petitioner attacked several other portions of the police testimony as being wholly unreliable. The specific testimony had to do with alleged inconsistencies with reference to a promise respecting transferring Clifford from Florida to Delaware without a detainer, whether or not at the first trial office Celano stated that Allison admitted he had acted as a lookout and an alleged promise regarding reduction of bail. The Delaware Supreme Court carefully considered these allegations and dismissed them as being without foundation. I agree completely with the conclusions of Justice Carey in those respects.

Indeed, it would be unusual if upon a retrial of a case in which two police officers testified at considerable length to a long series of transactions and occurrences there would not be inconsistencies. Trial counsel may try his case quite differently on the second occasion. He may ask questions not propounded at the original trial and fail to ask others that were propounded at the first trial. Memories become dimmer and, even, at times are revived as to some fact forgotten to be mentioned at the original trial. But the vagaries of the human mind and of the articulation of past events can scarcely be regarded as

perjury. In my judgment, having read a large portion of the record of these two cases, there is nothing so sinister or unreliable or contradictory about the testimony of these policemen as to suggest perjury or false swearing or inconsistency to the point of total unreliability. Petitioner has failed by a wide margin to bring this phase of his case within the purview of State v. Curran.

Petition dismissed.

Wilmington, Delaware

July 20, 1964

III.

SUPPLEMENTAL OPINION

Layton, District Judge.

Supplemental briefs were filed but for some reason not brought to the attention of this Court until after the main opinion was released. In defendant's supplemental brief, it is alleged that Escobedo v. State of Illinois, U.S. , No. 615 Oct. Term, 1963, 84 S. Ct. 1758 (1964), and Jackson v. Denno, U.S. , No. 62 Oct. Term, 1963, 84 S. Ct. 1774 (1964), govern these facts. I do not agree. In Escobedo, there was a clear and determined attempt to secure counsel which was frustrated by the police. In this case, the record does not even disclose an attempt to retain counsel.

In Jackson, aside from the strong dissent with which I am in complete agreement, I can see no applicability either. In that case, while no formal objection was made to the introduction of the confessions, it seems to have been implicit in the record that petitioner was taking the position that his confessions were not voluntary and considerable testimony was received from him contradicting the state's evidence to the effect that the confessions were freely given. Thus, an issue of fact as to the voluntariness of the confession was squarely raised. Here, not only did the petitioner stand mute, making no objection whatever[1] to the introduction of the admissions made by him but

[1] Under the Delaware practice referred to in the main opinion.

he never exercised his right to take the stand, without the presence of a jury,[2] and make an issue as to the voluntariness of his admissions. Compare Wilson v. State, 109 A. 2d 381 (Sup. Ct. Del. 381-387).

Whatever the reach of *Jackson* may be, and whether the Delaware practice of receiving confessions is identical with New York's or that of Massachusetts, is unnecessary to decide here because the rationale of *Jackson* simply does not govern these facts.

Petition dismissed.

Wilmington, Delaware

Dated: September 22, 1964.

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[2] Without in any way prejudicing his constitutional right not to take the stand in his own defense.

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 15,163

Clifford Williams,

Appellant

vs.

Raymond W. Anderson

(D. C. Habeas Corpus No. 38)

On Appeal From the United States District Court for the District of Delaware

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IV.

JUDGMENT

Present: McLaughlin, Ganey and Freedman, Circuit Judges

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the District Court, filed October 7, 1964, be, and the same is hereby affirmed, with costs.

Attest:

IDA O. CRESKOFF
Clerk

July 21, 1966

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 15163

Clifford A. Williams,
Appellant,

v.

Raymond W. Anderson,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

V.

OPINION OF THE COURT

Argued April 11, 1966

Before McLaughlin, Ganey and Freedman, Circuit Judges
(Filed July 21, 1966)

Per Curiam.

The District Court denied the application of appellant for a writ of habeas corpus. Appellant had been

convicted of burglary in the state court on March 30, 1961. The single issue of substance raised on this appeal was the asserted retroactiveness of the Escobedo rule. The United States Supreme Court in Johnson v. New Jersey, 384 U.S.—(June 20, 1966) ruled "that Escobedo affects only those cases in which the trial began after June 22, 1964, the date of that decision." (p. 1 slip op.).

Appellant also contends that Jackson v. Denno, 378 U.S. 363 (1964) governs here. The undisputed facts make it very clear that there was no issue in this trial with respect to the voluntariness of the confession. The point has no merit.

The judgment of the District Court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

VI.

EXCERPTS FROM TRANSCRIPT OF TESTIMONY IN TRIAL OF CLIFFORD A. WILLIAMS, ALLISON T. WILLIAMS AND EDWARD BRENNAN, DATED MARCH 28, 1961

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(23) ANTHONY CELANO

ANTHONY CELANO, a witness being produced, sworn and examined on the part and behalf of the State, testified as follows:

Direct Examination

BY MR. PARUSZEWSKI:

Q. Will you please repeat your name.

A. Anthony Celano.

Q. And by whom are you employed?

A. The Bureau of Police, Department of Public Safety, Wilmington, Delaware.

Q. And were you so employed on December 6, 1959?

A. Yes, sir.

Q. And have you been continuously so employed?

A. Yes, sir.

• • • • • • • • •

(46) Q. Did he tell you as to where he was?

A. Well, his part was a minor one in this operation, but he was not in the jewelry store.

MR. SNELLENBURG: Well, now, your Honor, that answer is not clear.

THE COURT: No, that answer isn't responsive, Officer.

Q. What was his role in it?

A. Well, actually, at this particular time, he didn't state. That comes later. But he did state that it was a minor one, your Honor.

* * * * * * * *

(65) THE COURT: Well, was any other defendant present?

MR. PARUSZEWSKI: The defendant, Allison Williams, was present.

MR. FRACZKOWSKI: That would not be admissible at all against Brennan.

MR. PARUSZEWSKI: And that would be admissible in court with an instruction.

MR. SNELLENBURG: It doesn't seem to me to be an admission against the declarant.

THE COURT: I don't see the necessity of stating that he is in custody with some statement submitted by Allison Williams.

MR. PARUSZEWSKI: No, this is about Clifford Williams, who is in custody in Dade County Prison in Florida. He then tells the witness who is on the stand now that he would make a full statement if he could get a guarantee that there would be no detainer lodged against him from Florida.

MR. SNELLENBURG: May it please your Honor, it seems to me that that accomplishes by indirect what you can't do directly.

The Rule is that a man can be taxed with a prior felony conviction.

(66) None of the men that I represent have prior felony convictions.

THE COURT: Mr. Snellenburg, it isn't necessary to show that he was in custody there. I think he will go along enough not to prejudice the defendant to that extent.

He can testify to the conversation or the admission that was made in Florida in Dade County, but I don't think that it is necessary that he should show that he was in custody at the time he made it.

MR. SNELLENBURG: No, he doesn't have to show that he was in custody.

BY THE COURT:

Q. That is what Mr. Snellenburg is objecting to, and I will ask you to just refrain hereafter from saying that he was in custody. He was in Dade County, Miami, Florida.

MR. PARUSZEWSKI: Yes; and, of course, the witness did proposition the officer, that he will make a full statement of the charge against him if there is no detainer by the authorities.

THE COURT: Well, I will permit you to do that, but I will suggest that you refrain from your question or your answer that he was in custody at the time that you had this conversation with him.

(68) THE COURT: Members of the Jury: I feel I should caution you just at this time.

The testimony you are about to hear will apply only to the Williams defendants, and not to Mr. Brennan. So I will ask you to charge your mind to the effect that you are not to apply this testimony, whatever it might be, insofar as Mr. Brennan is concerned.

BY MR. PARUSZEWSKI:

Q. Now, Officer, you testified that you Sergeant Merritt and the defendant, Allison T. Williams, did go to Florida and you arrived there on January 9, 1960?

A. Yes.

Q. Now, did you see the defendant, Clifford Williams, in Florida?

A. I did, sir.

(69) Q. Who was present at the time that you saw the defendant, Clifford Williams?

A. Allison Williams and Sergeant Merritt.

Q. And yourself, of course?

A. Yes, sir.

Q. What, if anything, transpired?

A. Of course, Allison Williams requested that he be allowed to talk to Clifford alone first and that he would have to explain to Clifford that the two officers were good officers and would help them if they can, if he was deserving of it.

When we interviewed Clifford Williams, he stated that he would give a full confession regarding this burglary in the event we brought him back to Wilmington without a detainer.

Q. Did you make any promise to him?

A. No, sir.

Q. Then, what happened?

A. Well, we returned to Wilmington. We had to bring Clifford Williams back to Wilmington because Allison Williams had stated to us that, without Clifford, it would have been futile in an attempt to recover the other half of the jewelry.

We referred to it as half of the jewelry because we estimated the loss at $60,000.

(70) Q. Then, you did proceed toward Wilmington eventually, leaving Florida?

A. Yes, sir, approximately six days later, yes, sir.

Q. Then, can you tell us what happened on your way to Wilmington?

A. On the way to Wilmington there were Sergeant Merritt and myself, Allison Williams, Clifford Williams, and another person in the automobile, which was Clifford Williams' automobile. We were driving from Florida.

Q. Whose automobile was it?

A. Clifford Williams'. It was a 1959 Oldsmobile convertible.

Q. Where did you pick up Clifford Williams' automobile?

A. Allison Williams brought it down to Wilmington.

Q. Oh, you drove down to Florida in Clifford Williams' automobile?

A. Yes, sir.

Q. Will you please tell us what conversation, and so on, you had on your way to Wilmington?

A. During the conversation, as we were in the State of Florida, coming up the highway, Allison Williams and Clifford Williams were discussing this same incident.

Clifford Williams stated to Allison Williams, "What (71) happened to the Nescafe jar?", that supposedly or allegedly was in the Thermos jug that had been recovered.

Allison Williams told Clifford that the Nescafe jar was not in the Thermos jug.

At this time, Clifford Williams stated, "That sticky-fingered son-of-a—", and requested that we stop the automobile.

Allison Williams never curses under any circumstances, doesn't smoke or doesn't drink, or anything like that, but Clifford did use profanity in this particular case, referring to this person as a sticky-fingered S.O.B., and wanted to stop at the nearest telephone booth to call Camden, New Jersey, which was done. Clifford Williams called Camden, New Jersey.

Q. Who was present at the time that that call was being made?

A. I was.

Q. Will you proceed with what you overheard?

A. Yes, sir. The man's first name was Joe, and he reminded him of the Nescafe jar, and apparently he got into the situation from Joe, and he had explained to Joe that he had better get the Nescafe jar.

After the conversation was over and in the car and in going back up towards Wilmington, he stated that it was possible that this fellow and his wife took the jewelry that (72) had been in the Nescafe jar.

BY THE COURT:

Q. Whose wife?

A. This is the sticky-fingers.

Q. Joe's wife?

A. Yes, sir, Joe's wife.

THE COURT: All right.

BY MR. PARUSZEWSKI:

Q. Now, did Allison Williams state anything as to whether or not he knew where the Nescafe jar was or how it got into the jug, and so on?

A. Allison Williams said he knew nothing of the Nescafe jar, and Clifford Williams stated that only he and Armond Luggie knew where it was.

Q. Who is Armond Luggie?

A. Armond Luggie, according to the Williams', was the actual man who cut the hole in the safe in this burglary. He is not alive today.

Q. He is now deceased, is that it?

A. That is right, sir.

Q. What other statement or conversation did you have with the defendants Clifford Williams and Allison T. Williams?

A. There was a continued conversation all the way and (73) they were quite friendly and were very ideal prisoners. I mean, they weren't restricted in any way other than the close watch by myself and Sergeant Merritt, and they made no attempts that they would try to get away or anything of that sort, and the conversation was very friendly all the way. It had to be, because we were all closely knit in a convertible two-seat sedan, and Armond Luggie was described as one nice fellow and Williams was sorry that we didn't have a chance to meet him.

(84) Q. All right. Now, when did you next see any of the defendants?

A. As to the exact date, I am not sure. Clifford Williams and Allison Williams both came to Wilmington and actually came to my home, and Sergeant Merritt was present at the time.

Q. And refer to your notes, Sergeant, and would you be able to give us the exact date?

A. It should have been some time in February. I would have to go, again, to my notes for the exact date.

Q. Will you go to your notes and get the exact date.

A. I am sorry, sir, it was January 28, 1960.

Q. And then what happened?

A. They wanted to interview another defendant in this case, because they suspected him of taking jewelry, and this was allowed.

The other defendant was brought in and they were allowed to interview this defendant that is not on trial in this trial. They were allowed to interview this person in the (85) interrogation alone in a private conversation.

Q. And did you talk to them after the private conversation?

A. Yes, sir.

Q. What happened then?

A. The two Williams stated that they had always suspected that this person had come on the roof of the house and over to the jewelry store, but had no reason to, because none of them never wore any rubber soles, and where was that person that could have worn shoes that eventually led to their arrest, and finally this person admitted that he did go over the rooftops, but not that a.m. He said that it was the night before.

Q. Then, did you see the defendants, Allison Williams and Clifford Williams, again?

A. Yes, sir. They came down again sometime in March.

Q. 1960?

A. I believe it was 1960. Oh, definitely, 1960. I am not sure, but I feel positive that it was March, 1960, some time during the month of March.

Q. And where did you see them?

A. At that time I was working in the City Solicitor's office and they came up to the City Solicitor's office to see me.

(86) Q. And what transpired, if anything?

A. And just friendly chatting, so to speak, "How have you been?", and they thought I got promoted, and, of course, I didn't, and Sergeant Merritt stated to me that he and the Williamses had gone to see Mr. Davis. What transpired there, I don't know.

Q. And then on March 10 did you see them?

A. May I refer to my notes again?

Q. Yes, if you will, please, to make sure.

A. That is right, sir.

Q. What happened on March 10?

A. On March 10 Allison Williams explained to me the functions of the O. D. T., which is a burglary alarm system; and, after he explained this to me, he, Clifford Williams, Allison Williams, myself and Merritt went down to Allison Williams' car, where they displayed two walkie-talkies.

Q. What is a walkie-talkie?

A. It is a means of communication from one person to another, without being close together. In other words, on the general order of a telephone actually with-

out any dialing system. It is actually a radio set-up. I can speak to you in a different location.

Q. So that you can be in different locations?

(87) A. And speak to one another.

Q. And you say that they had some walkie-talkies in the car?

A. Yes, sir.

Q. How many?

A. Two.

Q. And what conversation did they have with you relative to these two walkie-talkies that they had in Allison Williams' car?

A. At the time we learned from Williams that one walkie-talkies was used in a dental office near the Warner Theater by Allison Williams.

* * * * * * * *

(94) Q. You told us that, when you picked up Clifford Williams in Florida, he told you that he would make a confession?

A. Yes, sir.

Q. Did you ever, in fact, get a confession?

A. Not a full signed confession, no, sir.

Q. As a matter of fact, are there in this case and are there in the possession of the Wilmington Police Department any statements in writing by any of these defendants?

A. No, sir.

Q. Did you ask any of these defendants to make written statements?

A. Of course, I always do, if they will make a confession, yes, sir.

Q. In this case did you ask the defendants?

A. I feel sure I did, yes, sir.

Q. Did you or did you not in this case?

A. Yes, sir.

(95) Q. Your present recollection is that you did?

A. Oh, yes, sir.

Q. And I assume that they refused to give you written statements and that you don't have any, is that correct?

A. That is correct.

Q. Yet, notwithstanding their refusal to give you any written statements, you would have us believe that they made these oral statements that you testified to, is that correct?

A. Yes, sir.

Q. Sergeant, was it standard police procedure for you to arrange these conferences for the defendants with Mr. Davis and Mr. Flanzer?

A. Nothing in this case was standard. Everything was unusual.

Q. I take it that, Officer, the police cooperate with defendants in procuring bail bonds for their release, is that correct?

A. We did not procure the bail bonds.

Q. But they requested the opportunity?

A. Yes, sir, they requested to talk to Mr. Davis.

Q. You say that both of the Williamses denied to you that they had opened the safe, is that correct?

A. Yes, sir.

(132) NORWOOD MERRITT

NORWOOD MERRITT, a witness being produced, sworn and examined on the part and behalf of the State, testified as follows:

Direct Examination

BY MR. PARUSZEWSKI:

Q. Will you please repeat your name.

A. Norwood Merritt.

Q. And by whom are you employed?

A. The Department of Public Safety, Bureau of Police.

Q. In what capacity?

A. Detective Sergeant.

Q. Were you so employed on December 6, 1959?

A. I was.

* * * * * * * *

(160) Q. You did go to Florida?

A. Yes, sir.

Q. And what day did you leave for Florida?

A. On the 7th of January, 1960, Allison Williams, Sergeant Celano and myself left Wilmington in the defendant's car, a 1959 Olds 98 Convertible.

Q. Which defendant's car?

A. Clifford Williams.

Q. In other words, the car that you went down to Florida did not belong to Allison T. Williams, the defendant that drove down to Florida with you, but to the defendant, Clifford Williams?

A. That is correct.

* * * * * * * *

(165) Q. Now, you did arrive in Florida. When did you arrive in Florida?

A. We arrived there about 10:30, p.m., on the 8th, straight through from Wilmington.

Q. And who was it that went to Florida in the car?

A. Sergeant Celano, Allison T. Williams and myself.

Q. Now, did you see the defendant, Clifford Williams, in Florida?

A. On the 9th.

Q. The 9th of what month?

A. The 9th day of January, 1960, at approximately 9:00, a.m.

Q. Did you talk to him?

(166) A. We did.

Q. When you say "we", whom do you refer to?

A. Sergeant Celano, Allison Williams and myself.

Q. Now, what, if anything, was stated or said?

A. He wanted to come back to Delaware.

Q. Who is "he"?

A. Clifford Williams wanted to come back to the State of Delaware with us, which he subsequently did.

Q. Do you see Clifford Williams in the courtroom today?

A. Yes, sir.

Q. And where is he?

A. He is next to his brother, Allison.

Q. And where is Allison Williams sitting?

A. Next to Mr. Snellenburg.

Q. So, then, it is Mr. Snellenburg, Allison Williams and Clifford Williams?

A. That is correct.

Q. Now, what statements were made by the defendant, Clifford Williams, in Florida?

A. Most of the statements made by Clifford Williams was made on the trip back, which took place on the 14th of January, 1960.

* * * * * * * * *

(170) We made arrangements then for Mr. Davis to come back there with his attorney, Mr. Flanzer, the following morning.

Q. What date was that?

A. That would have been on the 16th of January. He was placed under bail in the Municipal Court that morning, and a professional bail bond was signed also by a bail bondsman after receiving a check from Mr. Davis that was written while we were there, and given to Mr. Flanzer to give to the professional bail bondsman.

* * * * * * * * *

(186) NORWOOD MERRITT (Resumed)

Cross-Examination

BY MR. SNELLENBURG:

Q. Sergeant Merritt, you were present yesterday when Sergeant Celano testified?

A. I was, sir.

* * * * * * * * *

(204) Q. You testified that Allison Williams was later released on his own personal recognizance, is that correct?

A. Yes, sir.

Q. And, by his own recognizance, you mean, his personal bond that was signed by himself alone?

A. No, sir.

Q. Who else signed the bond?

A. No one else. It was stipulated over the telephone (205) that he could be released, by Judge Herlihy, on his own recognizance.

Q. And you released him without signing any bond or anything like that?

A. Yes, sir.

BY THE COURT:

Q. You mean that he did not sign the bond personally?

A. No, sir, he didn't.

Q. He was let go without any bond at all?

A. He was released in a telephone call by Judge Herlihy on his own recognizance.

Q. When you say "his own recognizance", that means a bond without any surety?

A. He was released on his own bond.

Q. He was released on the faith that he would return?

A. Yes, sir.

BY MR. SNELLENBURG:

Q. In other words, you let him out on the street without providing some sort of bail, is that correct?

A. That is correct.

Q. And this was after he had made all these damaging statements that you and Celano have testified to?

A. Definitely, but he was going out for the purpose of (206) trying to obtain jewelry.

Q. And, after Williams had incriminated himself, as you have described, he walked out on the street without a nickel's worth of bail?

A. Mr. Snellenburg, I would have you believe the statements made before.

Q. Now, some time later—it was some time after you permitted Allison Williams to leave without any bail, you threatened that you would raise the bail to $40,000, didn't you?

A. To my knowledge, he was never threatened by anybody to raise the bail as high as $40,000.

Q. Well, at a later time application for bail was made, was it not?

A. Are you talking about prior to the 1st of January?

Q. At some time after he was permitted to go out on his recognizance, an application for bail was made, was it not?

A. Yes. The bail prior to that time, when he was brought back from New Jersey, if my memory serves me correctly—it was $15,000 bail, and the day after he was returned it was $5,000.

Q. Was there some new evidence in the case that indicated that such a bail was necessary, in view of the fact that you let him out previously with no bail?

(207) A. I didn't understand that.

Q. Was there some new evidence in the case that indicated to you that new bail was necessary?

A. The evidence showed his cooperation by getting the jewelry back.

Q. But why was bail fixed later, with no new evidence in the case?

A. Bail was set at $5,000.

Q. Why was bail set, when he had previously been let out without bail, Sergeant?

A. The Court set it, we didn't set it, in the Municipal Court.

Q. There was an application made to set bail, wasn't there?

A. A written application?

Q. An oral application by someone?

A. Yes, sir, it was made by Sergeant Celano and I, that bail be reduced from $15,000 to $5,000.

MR. PARUSZEWSKI: I object. I believe that Mr. Snellenburg should identify the time and the date. By that way, the witness will know to what he is testifying.

THE COURT: Well, as I understand it, after he had been released on his own recognizance to go to New Jersey, bail (208) was fixed at $15,000, or was it fixed before?

MR. PARUSZEWSKI: As I understand it, it was fixed before, and that is the reason that I request that the dates and the time be made known to this witness, so that he can intelligently answer.

BY THE COURT:

Q. Officer, can you recite for us what actually happened when Allison Williams was first taken into custody?

A. Yes, sir. He was taken to the Municipal Court.

Q. Was bail fixed at that time?

A. It was fixed at $15,000.

Q. Was it subsequently to that time that you asked permission from Judge Herlihy to take him back to New Jersey?

A. That night, the 31st of December, 1959.

Q. And then you asked that the bail be reduced to $5,000?

A. Yes, sir.

Q. And it was reduced to $5,000?

A. Yes, sir.

BY MR. SNELLENBURG:

Q. Did you tell Allison Williams that Mr. Davis was very upset about his loss?

A. We did.

Q. And did you tell Allison Williams that Mr. Davis might (209) commit suicide because of this disaster?

A. We explained to Allison Williams that the man was in his 60's and that he was completely ruined. He owed money and everything that was in his shop just before Christmas, he was completely ruined, and there was a remote possibility that he would do something like that.

Q. And did you tell Allison Williams that he would be charged with murder if Mr. Davis committed suicide?

A. We didn't tell him that he would be charged with murder.

Q. But it was as the result of this anxiety that he made these efforts to help you recover the stolen articles, is that correct?

A. That is correct.

* * * * * * * * *

(216) Q. The Detective Division has various electronic equipment for the purpose of recording human voices, is that correct?

A. The only thing we have is a Dictaphone machine.

Q. Was such a machine used to record such statements as you say Allison and Clifford Williams made?

A. We did not, because there was an agreement with them that we wouldn't record anything that was said, and I thought he was looking for a microphone under the table one time and, in fact, he was praying.

Q. And they were only too happy to make all these oral statements, is that correct?

A. Yes, sir.

Q. Was it after the Williamses had made all these oral (217) statements which you testified about that Mr. Davis came and furnished bail to release them?

A. Allison Williams was released on bail the day after he accompanied us to New Jersey, or we accompanied him.

Q. Who furnished the bail?

A. Mr. Davis.

Q. And this was after he had made at least some of the statements which you attribute to him?

A. Oh, yes.

Q. Sergeant, did you tell us a moment ago that you asked that the $15,000 bail be reduced to $5,000?

A. I did.

Q. Will you tell us why you would make such an application if Allison Williams hadn't made statements which you felt tended to incriminate him, in your opinion?

A. Due to the fact that he showed us his cooperation by taking us to the State of New Jersey and retrieved what was estimated to be over $20,000 worth of jewelry.

He stated that he couldn't get any more jewelry while he was inside, and he would have to be released, and he asked Mr. Davis if he would give him the money he needed for a professional bail bond; and Mr. Flanzer was there at the time, Mr. Davis' attorney, and he said, "Well, he has proved his (218) faith. You will never get it back if you don't let him out".

Q. You testified that Clifford Williams brought a ring and a diamond to Wilmington?

A. No, sir, Allison brought the ring.

Q. Did he tell you that the ring was his wife's engagement ring?

A. He told us that it was taken from his son after he was handcuffed in the State of New Jersey.

Q. Did you make a notation of that?

A. A mental notation.

Q. You made mental notations of some statements and written notes of others, is that correct, Sergeant?

A. One of the most important phases of this case took place on the 31st of December and January 1.

Q. Can you explain why you would leave what we will say was the most damaging admission outside?

A. I can. It was stipulated between the Williams brothers and Sergeant Celano and myself that we would do nothing, we would write nothing that would allow the Federal Bureau of Investigation to come into this case, and that, if anything was discovered outside of the State of Delaware, naturally they would have jurisdiction.

Q. Well, how could you, as a police officer, do anything (219) that would obstruct Federal justice, Sergeant?

A. Allison T. Williams made the statement to us that, if we contacted the F.B.I. or any other police agencies, we would get none of the jewelry back. That statement was made just prior to leaving New Jersey.

Q. I don't entirely understand your reasoning there. You put in the record statements that are incriminating to a degree, perhaps, and you leave out statements that are absolutely incriminating and you say that the reason for that is that you didn't want the F.B.I. to come into the case.

A. That is true.

. . . . . .

(224) Q. You say that Allison Williams discussed restitution with Mr. Davis, that is, rebate for his loss?

A. Both Allison and Clifford.

Q. Wasn't it at that time that Mr. Davis said that he would drop the charges if he was made whole again?

A. Mr. Davis had made that statement several times, and it was explained that Mr. Davis had no control over it.

Q. But he did make that statement to both of these defendants?

A. Yes, he did.

Q. In other words, at this time, would it be fair to say that the more pressure was on you and Sergeant Celano to recover the lost articles than there was to get a conviction of the case?

A. There is no pressure. There was no pressure at any time. It is purely that we are detectives and we have taken an oath as police officers.

Q. Your oath is not to recover private property, but to enforce the law, isn't that correct?

A. To protect property, yes. To protect life and property.

I might add at this time that, through the recovery of this jewelry, it was a help to us to convict them.

(225) Q. You testified also that Allison Williams said that a lookout was in the dentist's office near the place?

A. That is correct, sir.

Q. Yesterday Sergeant Celano testified that Allison Williams is supposed to have said to him that Allison Williams was at the dentist's office.

A. He made that statement in court, yesterday. Allison didn't make that statement to me. Sergeant Celano said that he made that statement to him.

* * * * * * * * *

(247) Q. So you cooperated with Mr. Williams in the concealment of the identification of the additional parties who were concerned in this transaction?

A. We were bound by our word to Mr. Williams, and that word was that we wouldn't notify any other police agency, and especially the F.B.I., due to the fact that, when he was brought back from New Jersey, he stated to us the reason that we were not notified by the F.B.I. in Trenton, in Newark, New Jersey, was due to the fact that they tried to have him go for something else, so that he would be incarcerated in the Federal penitentiary, and not in this. He had no faith in any (248) promises that the F.B.I. gave him, and he told us—this was done several times, especially at 9:30, p.m., on the last day of the year 1959, that, if we notified the F.B.I. or that they were

brought into it in any way, shape or form, that there would be no further jewelry recovered.

. . . . . .

(417) DEFENDANTS' PRAYERS

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(418) 4. In order that the admission be admissible it must have been obtained without the use of force, threats or promises of immunity. 22 C.J.S., p. 1250.

. . . . . .

(422) Storey, J., charging the jury:

. . . . . .

(429) Evidence has been introduced during this trial tending to show that on an occasion other than this, the defendant, Allison Williams, and also the defendant, Clifford Williams, made oral statements tending to prove their guilt of the alleged crime for which they are on trial. These statements, as I construe them, are in the form of what we would call as admissions. I will say to you that an admission can affect only the defendant who made it, and it is not evidence against other defendants who were not present when the admission was made.

Statements or declarations of one accused of a crime not amounting to a confession from which in connection with other evidence an inference of guilt may be drawn are admissible in evidence against him, but an admission against interest (430) made by one charged with a crime is not sufficient of itself to sustain a conviction, but it is a circumstance in connection with other evidence for consideration by the jury in determining the guilt of the accused. However, when the State has established that a

crime has been committed, an admission, coupled with such proof, is sufficient to sustain a verdict of guilty. Admissions are admissible provided they are voluntarily made, that is, without force, threats or promises.

You should weigh any admission that you might find to have been made in the light of all the circumstances immediately connected with the making of them as shown by the evidence, and all other evidence bearing reasonably upon the question?

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VII.

EXCERPTS FROM TRANSCRIPT OF TESTIMONY IN SECOND TRIAL OF ALLISON T. WILLIAMS, DATED JUNE 12, 1961

A. CELANO, called as a witness on part and behalf of the State, being duly sworn, was examined and testified as follows:

(Page 56)

A. Well, he stated that in order to recover the jewelry, which he would do, he would do everything in his power to recover the jewelry, he stated he would have to make phone calls. Then he asked us if we had jurisdiction in other states. We told him we didn't. And he didn't want the F.B.I. or any other police agency to be notified in the event he took us to recover the jewelry; otherwise he would not cooperate.

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(Page 59)

Q. In the early hours of December 31, 1959, did he make any statement or did he have any comment or discussion?

A. He made a statement that continually, from the time we picked him up in Jersey actually down the highway, in the police station, that he didn't feel he should be booked on a charge of burglary; that he was merely a lookout. He said his part was a minor one in this. And he stated that he had only been here twice in Wilmington planning the job.

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(Page 78)

Q. When did you arrive at Miami, Florida?

A. I believe it was January the 9th, sir. We stopped at the Dade County Sheriff's office and arrangements were made for a hotel and to interview Clifford Williams the following a.m.

Q. Now, in your presence did the defendant, Allison Williams, at any time talk to Clifford Williams in Miami, Florida?

A. Yes, sir. He was with us just about always when we interviewed Clifford Williams.

Q. Did the defendant Allison Williams make any statements relative to the alleged burglary of the House of Diamonds?

A. At the time we interviewed Clifford in the jail the statements was made in the presence of the defendant, and Clifford, his brother. Clifford stated he would do everything in his power to help recover the jewelry if we could get him out of Florida without a detainer.

* * * * * * * * *

NORWOOD MERRITT, called as a witness on part and behalf of the State, being duly sworn, was examined and testified as follows:

(Pages 119-120)

Q. Then what happened? What did defendant say?

A. He stated he didn't know what he could do, that he wanted to contact an attorney before he committed himself on anything.

Q. So then what did you do, or what did you and Lieutenant Celano do?

A. We then brought him back to the State of Delaware, and in the conversations at Central he stated that

he had been picked up in Morristown, that the F.B.I. had been very rough on him, that his son was there at the time, that they had slapped him around and he had no faith whatsoever in the F.B.I.

He made us promise the very first day we had him back that if he cooperated in any way, shape, or form with the local authorities here, that we are not to notify the F.B.I. in anything that they may have jurisdiction in. We made the promise to him that if there was any possible way we would not (p. 120) notify the F.B.I. in anything that we would have jurisdiction in prior to notifying them.

Q. Now when was he actually brought into Central at Wilmington?

A. Approximately 7:30 p.m. on the 30th of December, 1959.

* * * * * * * * *

(Pages 159-160)

Q. Why wasn't this walkie-talkie, or the pair of them confiscated by you and then Sergeant Celano?

A. As previously testified, we were still in hopes of getting the balance of the diamonds back. We did not know at the time that all of them had been disposed of. It was only an assumption. And if we had taken the walkie-talkies away from them and held them as evidence they would have lost complete faith in us. They would not have cooperated with us any more. We knew that.

BY THE COURT:

Q. How much faith did they have in you, Officer?

A. Beg your pardon?

Q. You are talking about faith. How much faith did they have in you? What did you promise them?

A. There was no promises made whatsoever, your Honor.

The Attorney General, Januar Bove himself, was brought to the Detective Division.

Q. I am not talking about the Attorney General. I am talking about you and your companion officer, during all this period of time. Did you at any time directly tell to them or say to them words that inferred that you were going to grant them a favor for this consideration they were giving to you?

A. Yes, sir.

Q. What was it?

A. I believe that should be repeated not in the presence of the jury, your Honor.

Q. I want to know what it was. Speak it out.

A. Yes, sir. The State law in the State of Delaware is anyone that commits the crime of burglary, whatever crime committed, in the act of burglary, can also be charged against the defendants. The charge in this specific case is larceny value of $100,000 worth of jewelry.

With the Attorney General's Office's permission we told them that if he cooperated with us, got the jewelry back for us, pled guilty to burglary 4th degree, they would not be tried on a charge of larceny. That was the only promise made to them and that was with the cooperation of the Attorney General's Office.

* * * * * * * * *

(Pages 182-185)

THE COURT: We have got a very interesting legal question in this case, and that is whether the promise by the officer to this defendant nullified everything the defendant said to him.

MR. PARUSZEWSKI: That would be after the promise, of course.

THE COURT: Yes, but I don't know when the promise was made. Now the officer didn't testify as to when it was made, but the officer admitted that he told this defendant that if he would cooperate and help, help get the diamonds back and tell his side of the story, that he would not—promised not to prosecute him for larceny, if he would plead guilty to fourth degree burglary.

Now it doesn't seem to me to make any difference whether he pleads guilty to second degree burglary or goes on trial, if the promise was made which formed the basis of the defendant's admissions and confession, it would seem to me that that would nullify his confession from that time on.

In other words it would go to the voluntariness of this defendant's confession. A police officer can't promise a man that he won't prosecute him for a certain crime. He can't make a deal with him. But if he does, the voluntariness of his confession goes out the window. Now you will agree with that, won't you?

MR. PARUSZEWSKI: It would be a jury problem to determine.

THE COURT: A jury problem? When the officer testified he did it himself? The defendant hasn't accused the officer of this. The officer has come out and admitted it.

MR. PARUSZEWSKI: All right. Now, I will go along with your Honor on that only—

THE COURT: Then you will agree with me?

MR. PARUSZEWSKI: Only things that happened after that.

THE COURT: Well, then, bring the officer back and find out when this happened.

MR. PARUSZEWSKI: Out of the presence of the jury on voir dire?

THE COURT: Well, you can do it on voir dire and then bring the jury back, yes. Bring him up.

BY MR. PARUSZEWSKI:

Q. Sergeant Merritt, you testified before that a certain promise was made to the defendant, Allison Williams?

A. That is correct.

Q. Is that true?

A. Yes, sir.

Q. Now specifically what was that promise?

A. The promise was made in the presence of the Attorney General, Januar Bove, on January the 16th, when Clifford was brought back from Miami, Florida, in the Detective Division. The promise at that time was made that if he brought the jewelry back that the charge of larceny would be dismissed on him in the Attorney General's Office; they would not prosecute him on that charge providing he pled guilty to burglary in this case.

. . . . . .

(Pages 187-188)

THE COURT: Bring in the jury.

(The jury returned to the courtroom and took their respective seats in the jury box.)

THE COURT: Now ladies and gentlemen, I want to make a statement to you and I want you to pay particular attention to the statement I am about to make.

There is testimony given by the two officers as to statements made by the defendant to them concerning quite a few things. That started in December and ran through January.

Now I am instructing you that you are not to consider any statements made by this defendant to either one of these officers after the 16th of January. Statements made by the defendant to the officers that you find that he made up to the 16th are for your consideration when you deliberate but statements after the 16th I have ruled out and I am striking all that testimony concerning those admissions.

The reason I am doing it is that on the 16th of January there was a promise made by the officers that if the defendant came in and pled guilty to fourth degree burglary the larceny charge would not be prosecuted against him. I have held that that destroyed the voluntariness of what he said subsequent to the 16th, that was the day he said it. So after that date you can't consider anything that the defendant said to the officers. But you may consider everything up to that date. Because, you see, there is no question of voluntariness up to that time for an opening on his part. But after the 16th it can be said to be tainted by a promise, and therefore it is ruled out.

Is that clear to all of you? Because it is important.

All right, proceed.

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(Pages 189-190)

Q. Now Sergeant, you testified a while ago that a certain promise was made either by you or Sergeant Celano or by somebody else. When was that promise made?

A. The 16th of January, Attorney General Bove and Allison and Clifford Williams, Sergeant Celano and myself.

Q. Where was it made?

A. In the interrogation room of the Detective Division.

Q. What was that promise?

A. Januar Bove at the time made the statement to Allison Williams that no promises whatsoever that any police officer would make to them, we had no right to make any promises, and so forth. And it was brought out at that time that if the jewelry was brought back, the balance of the jewelry, that they would not be charged for larceny. Januar Bove made the agreement with them that they would not be prosecuted by the Attorney General's office on the charge of larceny if the fruits of the crime had been returned.

Q. That they would not be prosecuted for the crime of larceny?

A. That is correct; provided they pled guilty to burglary 4th degree.

Q. And that if the balance of the jewelry was returned?

A. That is correct.

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(Pages 193-199)

(Cross-Examination By Mr. Snellenburg:)

Q. Sergeant Merritt, the first day that you had this defendant in custody did not the question of bail also come up?

A. The question of bail was brought up the following morning when we were—that was the 31st, we were taking him to Municipal Court and bail was set at that time.

Q. And you knew at that time that this defendant personally did not have the means to secure substantial bail?

A. That is true.

Q. And didn't you and Celano both then that day tell him if he would cooperate you would see that there was no substantial bail placed, and then in pursuance of that promise didn't you go to Judge Herlihy and ask him to fix a $500 recognizance bail that would require no cash?

A. No, sir; we did not. Bail was originally set at $60,000 by the Federal Government on the warrant that they held in New Jersey. When he was brought to Delaware on the 31st, the bail was set at $15,000, by Judge Herlihy.

On the following Tuesday, I believe it was the 2nd day of January, bail was reduced then to $5,000 because the jewelry—part of the jewelry had been returned and he couldn't—

Q. Now you told us everything but the important part, Sergeant. Why was the bail reduced in that manner?

A. Because he had showed faith by getting part of the jewelry back, and couldn't do anything in jail relative to getting the rest of it back.

Q. Before he went over to New Jersey the $500 recognizance was fixed, wasn't it?

A. There was no $500. Just his own recognizance.

Q. Just his own recognizance?

A. That is correct.

Q. In other words no cash bond?

A. None whatsoever.

Q. That was the bond fixed before he went over in New Jersey?

A. That was to have him released so he could go over to New Jersey.

Q. And didn't you, prior to the time you went to New Jersey, tell this defendant if he cooperated you would see that no substantial bail was required?

A. We told him that the bail would be reduced if we were above to get any jewelry from Jersey, that he couldn't get any from Jersey while he was in jail.

Q. After that you went to Jersey?

A. Yes.

Q. And it was after that he told you he was only a lookout?

A. No, sir; he made that statement the very first day we interrogated him.

Q. Before there were any discussions about bail?

A. Positively. Bail wasn't set until the 31st.

* * * * * * * * *

THE COURT: Now, he wasn't under bail here; how did Judge Herlihy happen to take his bond?

MR. PARUSZEWSKI: He was under bail when he was first arrested and brought to Delaware. That is true.

THE COURT: And he was placed under $5,000 bail.

THE WITNESS: Fifteen thousand, Your Honor.

BY THE COURT:

Q. Now when was it reduced to five?

A. January the 2nd.

Q. Why?

A. Because of his cooperation by getting the jewelry back the Judge felt, or we felt, he couldn't get any more jewelry back if he was in jail, and he was unable to get fifteen thousand bail.

BY THE COURT:

Q. All right now, Officer, let's relate here—I don't want this jury confused. I want you to relate any statements that were made to you by this defendant from the time you obtained him in New Jersey until the 31st of December.

(Addressing the jury) And these are the only statements, ladies and gentlemen, that you are going to be able to consider, because a few minutes ago we struck the testimony from January the 16th. Now because of the promise to reduce the bail, which was reduced, so the man could get out upon his promise to go get the jewelry, we are going to strike the testimony from December 31st. You understand that?

BY THE COURT:

Q. Now, Officer, so the jury will understand, what were the statements made by this defendant to you from the time you obtained him in New Jersey until the 31st day of December?

. . . . . .

(Page 201—N. Merritt—Cross:)

* * * * * * * * *

Q. All right. Then you may testify up to that time, officer.

A. He had been to Delaware a couple of times, twice, in planning the job, that he was again merely only a lookout.

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(Page 354)

THE COURT: Ladies and gentlemen, I want to instruct you now, and it is very important in this case, the defendant says that after he returned from New Jersey with the police on the 30th, sometime after his return to Wilmington, there was a promise made by the police that if he would cooperate in helping to obtain the return of the diamonds that they would intercede to reduce his bail, help him get bail, and also intercede for his probation, and if convicted, go to the Governor—words to that effect. He says that occurred on the afternoon of the 30th after he was brought back from New Jersey, a penitentiary over there.

Now, the officers deny that. If you find that conversation took place at that time, as the defendant contends, that is, the afternoon of the 30th, then you will disregard anything that he did or said after that time.

The officers, or the State, on the other hand, contend that the conversation took place on the afternoon of the 31st, after the woman came here and talked to him, you will recall. They contend that at that time they said, "If you will help get the diamonds back we will help you to get

your bail reduced so that you can get out on bail." They deny saying to him they would help him with probation; they deny saying to him that they would intercede with the Governor if convicted. But they do admit that on the afternoon, late afternoon of the 31st, that they did promise him that they would help him with his bail so he could get out if he would in turn help them secure the diamonds.

That is a promise, and, therefore, under that promise I must rule out everything that he did or said subsequent to that time. If you find it to be on the 31st, in the afternoon, then you may consider anything up to the afternoon on the 31st that he said or did. If you find that it occurred in accordance with the defendant's theory, on the afternoon of the 30th, when he was brought back from New Jersey, then you won't consider anything from the afternoon of the 30th on, that he said or did.

Is that clear to all of you? If it is not clear please raise your hand, any juror.

(There was no response).

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